[*June* 25*th*, 1771.] (No 8. Kirkcudbright

Unto the Right Honourable the Lords of Council and Session.

THE

PETITION

OF

JOHN SPOTTISWOOD of *Spottiswood.*

Humbly sheweth,

THAT in the year 1741, the petitioner obtained from the Crown, a charter of the lands and barony of New Abbey, and others therein mentioned, which had belonged to his predecessor, Sir Robert Spottiswood, and by him been alienated for a valuable consideration to King Charles I. for the purpose of endewing the Bishoprick of Edinburgh; but which valuable consideration never had been paid.

The petitioner having been infeft upon this charter, and finding the vassals of the Abbey unwilling to recognize him as their supperior; as also, finding that a number who were in possession of tiends and other subjects belonging to the

Abbey, refuſed to give them up to him, was at laſt obliged in the year 1746, to bring a general action of reduction and improbation againſt a number of thoſe vaſſals and others; and among the reſt, he called John Fraſer of Laggan, as proprietor of the lands of Nether Yett, and Annat Land, Friar Yard, Balbeck, and Eaſter Glen. In this action compearance was made for Mr Fraſer, firſt and ſecond terms were aſſigned for ſatisfying the production, on which acts were extracted; and on the act for the ſecond term, there appears the following minute and interlocutor: "30 June "1749, Lord Eaſedale, *partibus ut in actu*, the Lord Ordi- "nary grants certification, and reduce, decern, and de- "clare for not production." It appears however, that after this ſome writings had been produced by Mr Stewart of Shambelly, and others of the defenders. This occaſioned the following minute and interlocutor: "27 July 1749, "Lord Drummore, *partibus ut in actu*, The Lord Ordinary "makes great *aviſandim* with the writes produced, and "grants certification, *quoad ultra et contra non producta*."

A very particular inventary of writs was given in by Mr Fraſer in this proceſs in the year 1749, ſo that it appears he was not only ſufficiently certiorated of the proceſs itſelf, but actually paid abundance of attention to it, notwithſtanding his being thus interpelled; however, he thought proper in the year 1750, to make up his titles by taking infeftment from the Crown, on a precept from the Chancery, as heir to his father Hugh, who ſtood infeft upon a charter of adjudication.

This proceſs did not proceed any great length, a number of thoſe who held the tiends belonging to the Abbey, agreed to purchaſe them from the petitioner, and he from time to time was employed in making tranſactions of that nature, ſo that the action lay over.

About the year 1760, however, Burnet of Craigend, one of

of the vaſſals of the Abbey, thought proper notwithſtanding the petitioner's right, to apply to the Barons of Exchequer for a charter from the Crown. The petitioner appeared in Exchequer, and oppoſed this demand; the Barons however, ordered the ſignature to paſs, without prejudice to the petitioner aſcertaining his right at law, to the ſuperiorities of the lands contained in the ſaid ſignature, as he ſhould be adviſed. This produced a declarator of non-entry in this Court, at the inſtance of the petitioner, againſt Mr Burnet of Craigend, which was raiſed without loſs of time, and came before the Lord Alemoor Ordinary. The defender inſiſted on a variety of defences, but upon 10 December 1761, the Lord Ordinary pronounced the following particular interlocutor: " Finds, that as the charter from the Crown in fa-
" vour of the purſuer, *anno* 1742, proceeds upon the nar-
" rative of the charter 1624, the ſignature 1641, the ſigna-
" ture 1661, the declaration of Parliament 1695, and the
" decree of the Court of Seſſion 1741, that charter ought to
" receive the moſt liberal conſtruction, in order to reſtore to
" the purſuer the full right and title of the lands and baro-
" ny of New Abbey, &c. as the the ſame ſtood in the per-
" ſon of Sir Robert Spottiſwood, the purſuer's great grand-
" father in the 1634, when he reſigned them into the hands
" of the Crown, for a price which was never paid. Finds,
" that by virtue of the charter 1624, and the act of deſolu-
" tion 1633, Sir Thomas Spottiſwood was in the year 1634,
" entitled to the ſuperiority of the lands formerly held of
" the Abbacy of New Abbey. Finds, that the act 1690,
" declaring the ſuperiorities which pertained to Biſhops, to
" belong to the Crown, ought not to be extended to the
" ſuperiorities of New Abbey, in reſpect that by the decla-
" ration of Parliament 1695, it is declared, That the act
" 1662, reſtoring Biſhops to their poſſeſſions as in the year
" 1637, did not prejudge the purſuer's father; and there-
" fore

" fore found, that the purſuer is entitled to the ſuperiority
" of the defender's lands in queſtion, which had confeſſed-
" ly been held of the Abbacy of New Abbey, and that
" theſe lands are in non-entry, and decerned, and declared
" accordingly."

This interlocutor, was indeed upon a reclaiming petition and anſwers, reverſed; but upon an appeal to the Houſe of Lords, the following judgement was pronounced on 22 March 1763: " It is ordered and adjudged by the Lords
" Spiritual and Temporal in Parliament aſſembled, That the
" ſaid interlocutors complained of in ſaid appeal, be, and
" the ſame are hereby reverſed, and it is farther ordered
" and adjudged, That the interlocutor of the Lord Ordi-
" nary 10 December 1761, be, and the ſame is hereby af-
" firmed, with an addition after the words, and that theſe
" lands are in non-entry of the following words, *viz.* But
" ſo as not to affect the reſpondent with any penalties on
" account of ſuch non-entry, except from the commence-
" ment of the preſent action. And it is further ordered,
" That the ſaid Court of Seſſion, do give the proper direc-
" tions for carrying this judgement into execution."

Notwithſtanding this deciſion in the caſe of Mr Burnet, the petitioner found the other vaſſals ſtill unwilling to acknowledge him; he therefore brought actions againſt ſundry of them in the way of declarators of non-entry; among others, he called Mr Copland of Colieſton, Mr Craick of Arbigland, Mr Turner of Ardwal, and alſo John Fraſer of Laggan.

A long litigation inſued between the petitioner and Meſſrs Copland, Craick, and Turner; all of whom founded on infeftments from the Crown expede before the petitioner's charter, and moſt of them cloathed with a poſſeſſion of 40 years. This gave occaſion to very ample diſquiſitions; but the petitioner, after the matter had been fully convaſſed by your Lordſhips,

prevailed

prevailed and obtained decreet of declarator, which is extracted, and the grand decerniture, of which is in the following words: " Repelled, and hereby repel the de-
" fences aftermentioned proponed for the defenders, found,
" and hereby find the ſaid John Spottiſwood purſuer, in
" virtue of the charter and ſaſine lybelled on, has a good
" and undoubted right to the ſuperiority of the lands
" of Ardwell, Inglifton, Carſe, and Little Barr, Darngar-
" roch, and Kirk-lands of Croſſmichael, as ſeverally diſcrib-
" ed in the lybel, and pertinants of the ſaid lands, and to
" the feu-duties and other caſualities of ſuperiority due and
" payable furth of the ſame, and is entilted to enter and re-
" ceive the vaſſals of theſe lands by charters and precepts of
" *clare conſtat*, in the ſame manner as the ancient Abbots and
" convent of the monaſtry of New Abbey, could have done
" before the Reformation, and that the aforeſaid lands, except
" the half of the Kirk-land's of Croſſmichael, which pertain-
" ed to Agnes Swinton, are and have been in the purſuer's
" hands; as immediate lawful ſuperior of the ſame, by reaſon
" of non-entry, from and ſince the date of the purſuer's
" charter from the Crown, and infeftment taken thereon in
" the year 1742, and that the foreſaid half of the Kirk-lands
" of Croſſmichael, which pertained to the ſaid Agnes Swin-
" ton, are and have been in the purſuer's hands as immedi-
" ate ſuperior thereof, by reaſon of non-entry, from and ſince
" the death of the ſaid Agnes Swinton, which happened up-
" pon the and found, and hereby find,
" that the purſuer has right to the full rent, mails and du-
" ties payable for the aforeſaid whole lands, including the a-
" foreſaid half of the Kirk-lands of Croſſmichael, from and
" ſince the term of Whiteſunday 1764, the date of the cita-
" tion to the defenders in this proceſs, and in time coming,
" till the defenders be lawfully entered and received by the
" purſuer, as his vaſſals in the lands above mentioned; and to

" a year's rent of their respective lands, at and upon their
" being entered therein, and decerned and declared, accord-
" ingly."

The defences which were repelled, as mentioned in this grand decerniture, tho' not specially recited in the interlocutor, were in the first place, general objections to the petitioner's title, as superior of the lands. These were pretended to be argued upon new productions, and upon grounds afforded by them, which had not appeared in Burnet of Craigend's case. In the second place, infeftments flowing from the Crown, and long possession following upon these infeftments, which it was alledged, gave a prescriptive right to the then defenders, to hold their lands directly of the Crown, exclusive of any claim to the superiority in the person of the petitioner.

After the petitioner had prevailed in this action, where every thing had been pleaded against him, that the nature of the thing would admit of, he expected that the other vassals of New Abbey would make no longer any further objections to his right, and would submit to take out charters from him. In this however he has been disappointed, for Mr Fraser, who had not any other defence, than what has been pleaded by Messrs Copland, Craick, and Turner, and who in many particulars was in a much worse situation than they, thought proper still to refuse to recognize the petitioner as his superior, and to insist that he was entitled to hold his lands of the Crown. He had already been called into Court by a declarator of non-entry, and the petitioner expected that he might have been prevailed on by reason, to take out his charter: He therefore delayed pushing matters forward in a judicial course, till he found it was absolutely necessary. This appearing at last, he was obliged to insist in his action.

The cause coming in the course of the rolls before the Lord Elliock Ordinary: His Lordship upon advising minutes

upon

upon the 23 of November 1770, pronouuced the following interlocutor: " Having considered the above debate, Finds, " that the pursuer in virtue of the charter and sasine ly- " belled on, has good and undoubted right to the superio- " rity of the lands of Neither Yett, Easter Glen, Meikle " Barbeth, Annat-land, and Frear Yard, as discribed in the " lybell, and pertinents of the said lands, and to the feu- " duties and other casualties of supereority due and pay- " able furth of the same, and is entitled to enter and re- " ceive the vassals of these lands by charters and precepts " of *clare constat*, in the same manner as the ancient " Abbots and convent of the monastry of New Abbey could " have done before the Reformation; and that the afore- " said lands, are and have been in the pursuer's hands, as " immediate lawful superior of the same by reason of non- " entry, from and since the date of the pursuer's charter " from the Crown, and infeftment taken thereon in the " 1742; and finds, that the pursuer has right to the full " rent, mails, and duties payable for the foresaid lands, " from and since 20th May 1765 years, the date of the ci- " tation to the defender, John Fraser, in this process, and in " time coming, until he be lawfully entered and received " by the pursuer as his vassal in the lands above menti- " oned, and to a year's rent of his lands, at, and upon his " being entered therein, and decerns, and declares according- " ly." And to this interlocutor his Lordship adhered, upon a representation and answers, upon the 15 January, and afterwards refused another representation for Mr Fraser without answers, upon the 29 January 1771.

The defender reclaimed against these interlocutors, and answers having been given in to his petition, upon the 14 June current, your Lordships pronounced the following interlocutor: " The Lords having advised this petition with " the answers thereto, Find, that the lands within menti-

" oned,

" oned, have been in the purſuer's hands as lawful ſupe-
" rior thereof, by reaſon of non-entry, from and ſince the
" death of Hugh Fraſer, the petitioner's father; and that
" the pitioner is entitled to enter as heir therein, and is not
" obliged to enter as a ſingular ſucceſſor; but in reſpect that
" the original lybel concludes for more than is now found
" due, and that the proceſs was allowed to ly over and fall
" aſleep, from 1765, to 1770. Find, that the purſuer has on-
" ly right to the retour-duties from the father's death, till
" 23 November laſt, the date of the Ordinary's interlocutor
" reclaimed againſt, and to the full mails and duties ſince
" that time, during the non-entry, and with theſe variati-
" ons they adhere to the Lord Ordinary's interlocutor, and
" refuſe the petition.

This interlocutor, the petitioner humbly ſubmits to the review of your Lordſhips, in ſo far as it finds that he has right to the full mails and duties of the lands, only ſince the date of the Lord Ordinary's interlocutor; for as to the other point, viz. The defender being obliged to enter as a ſingular ſucceſſor, and not as an heir, he is willing, ſince your Lordſhips have determined it againſt him, to acquieſce in the determination.

The petitioner humbly apprehends, that there are few points in our law better aſcertained than this, that a vaſſal who lyes out unentered before he is interpelled by the ſuperior, is lyable only in the retoured duties; but from the moment he is interpelled, that is to ſay, from the moment he is cited in an action of declarator of non-entry, he is lyable in the full mails and duties of the lands, as he is then contemning the ſuperior's mandate to enter himſelf to the feu.

This point appears to have been decided in terms, in a caſe reported by Lord Stair, between Mr John Harper and his vaſſals, decided 25 July 1666. The deciſion in

Lord

Lord Stair, is in the following words : " Mr John Harper " purſued a declarator of non-entry againſt " his vaſſal, who alledged that he was only lyable for " the retour mails, till the decreet of general declarator " was obtained. It was anſwered, the common cuſtom " was, That from the citation in the general declarator, " mails, and duties were due in the ſpecial, becauſe " the general declarator, declares the non-entry ſince the " date of the ſummons, and ſo the mails and duties " are not due from the date of obtaining the decreet, but " from the years decerned therein, which is from the date " of the ſummons. The Lords found the mails and duties " due ſince the time of the citation, and not only ſince " the time of the ſentence."

A variety of other deciſions to the ſame purpoſe are quoted in the Dictionary, *Voce Non-entry*, vol. 2. p. 5. which the petitioner ſhall not trouble your Lordſhips with at length, expecting the caſe of Faa, Laird of Purie, 12 June 1673, reported alſo by Lord Stair, which the petitioner chuſes to ſtate at length; becauſe the action in that caſe was not brought directly by the ſuperior, but by a donator, concerning the validity of whoſe author's right there was ſome doubt, the deciſion is in the following words : " Ro- " bert Faa, being donator to the non-entry and other ca- " ſualties of the ſuperiority of certain lands belonging in " property to the Lord Balmerino, and the Laird of Purie, " by gift of the Lord Lindſay, now ſuperior in place " of the Lord Spenzie his author, purſues declarator of " non-entry, and concludes payment of the mails and du- " ties. The defenders aledged; 1*mo*, That the declara- " tor was not relevant for mails and duties, but only " from the ſentence in the general declarator, and for " the retoured mails till then. 2*do*, The purſuers having

 " right

" right from the Lord Lindſay, doth not inſtruct a ſuffi-
" cient title, for the Lord Lindſay's ſaſine is null, not be-
" ing regiſtered in the ſhire where the lands ly. It was
" anſwered, that in the ſaſine there is expreſt an union
" of lands in ſeveral ſhires, and one place deſtinate for
" ſaſine of the whole, ſo that the ſaſine being regiſtered
" in that ſhire where the lands ly, upon which ſaſine
" was to be taken for the whole, it is ſufficient. *2do*,
" The act for regiſtration of ſaſines doth not declare them
" ſimply null, but only in relation to thoſe that have a
" better, tho' poſterior right; But the defenders have
" no right to the ſuperiority or cauſualties thereof. The
" Lords found the declarator of non-entry to extend to
" the mails and duties from the citation, whereupon
" the general declarator proceeded, and not from the
" ſentence only; and found that the ſaſine was not null,
" as to the defenders, who had no right, but not upon
" the account of the union, which they had no occaſion
" to determine in this caſe.

The general rule therefore ſtands eſtabliſhed by theſe deciſions without contraverſy. It remains therefore to examine how far the reaſons contain'd in the judgement of your Lordſhips, are ſufficient to diſtinguiſh this caſe, from thoſe which uſually happen: For with reſpect to the general circumſtances of this caſe, the petitioner apprehends, that the caſe laſt cited, is a ſtronger one than this. There the ſuperiority had been tranſmitted from one hand to another, the diſponee had taken infeftment by virtue of a clauſe of union, and regiſtered his infeftment in another ſhire, than that in which the lands lay, ſo that the vaſſal could learn nothing from the regiſter of his own county or the general regiſter, concerning the right of this diſponee, and the diſponee beſides, was not inſiſting himſelf, but a donator in his right;

right; all these were favourable circumstances, upon which the vassal excused his contempt, till sentence was pronounced. But in the present case, Mr Fraser was early certiorated of the petitioner's right, by the action of improbation brought in 1746, he had occasion to see that right made effectual by a judgement in the last resort, in the case of Mr Burnet of Craigend: Two years after which he was cited in the process; he then saw judgement given by this Court in the case of others, who were in a more favourable situation than himself; yet he never once offered to enter himself with the petitioner, but stood out, till he should be compelled by a legal sentence.

With respect to those circumstances mentioned in the interlocutor of your Lordships, the petitioner must with all submission observe, that his concluding in the summons for the defender entering as a singular successor, does not appear to afford him a sufficient defence, unless it had been joined on his part with an offer, to enter as heir to his father. Had he demanded an entry as an heir, and tendered his composition accordingly, he might with some grace have said, that he ought not to be lyable in the full mails and duties, because his supperior had been in *mora* in entering him; but when after seeing the fate of Mr Burnet of Craigend, in the 1763, and Messrs Copland, Craick, and Turner, in 1768, he not only stood out unentered, but even contended, that he was bound to enter in no shape whatever with the petitioner; and on the contrary, was entitled to hold his lands directly of the Crown, he was evidently acting in contempt of the lawful claim of his superior, and can alledge no excuse whatsoever for his contumacy.

It deserves likewise to be taken notice of, that in the judgement which was given by your Lordships, in the case of Messrs Copland, Craick, and Turner, they were all found obliged to enter as singular successors, tho' both Mr Copland,

land, and Mr Turner had an equal claim to be entered in the character of heirs with Mr Fraſer, and Mr Craick was in poſſeſſion by virtue of an infeftment not taken, during the dependance of a proceſs of improbation, as Mr Fraſer's was, but at a time when he was not interpelled by any body, and which conſequently afforded a ſtrong plea of *bona fides*.

The petitioner therefore was in *bona fide*, in conſequence of the deceſion in the caſe of Meſſrs Copland and others, to inſiſt, that Mr Fraſer ſhould enter as a ſingular ſucceſſor, and pay a full year's rent for his entry to the ſupperior. Mr Fraſer on the other hand was in *peſſima fide*, to plead againſt the petitioner, that he was not entitled to demand of him, to enter as his vaſſal, but that he continues a vaſſal of the Crown, notwithſtanding the grant in favour of the petitioner.

The petitioner therefore humbly apprehends, that as the queſtion concerning the amount of the compoſition payable by Mr Fraſer, was not the reaſon why he lyes out unentered, but on the contrary, it is owing to his having objected to hold of the petitioner as his ſuperior, the petitioner cannot be conſidered as in any *mora*, and therefore ought not to be barred of his claim, for the full mails and duties, from the date of the citation.

As to the other reaſon aſſigned by your Lordſhips interlocutor, for finding full mails and duties, back only from the date of the Lord Ordinary's interlocutor, viz. That the proceſs was allowed to fall aſleep, and ly over from the year 1765, to the year 1770. The petitioner does in the firſt, place humbly contend, that this affords no ſufficient reaſon for the petitioner not being entitled to the mails and duties from citation; and in the ſecond place, that altho' it did afford ſuch a reaſon, yet it ought not to cut off

his

his claim farther back than to the date of the ſummons of wakening, in the year 1770.

That it does afford no ſufficient reaſon at all for reſtricting the petitioner's claim, for the full mails and duties, the petitioner apprehends is evinced by the whole train of the deciſions of this Court, which have never required any diligence on the part of the ſuperior, to entitle him to the full mails and duties after citation; but on the contrary, have declared them to be his right, unleſs the vaſſal exerts himſelf to the very utmoſt, by tendering a charter; to him the citation being determined by the law, to be the period from which the full mails and duties began to be due; it is ſufficient that the ſuperior founds his right, by giving the citation the full mails and duties, begin to be acclaimable from that period, whether the ſuperior puſhes forward for a ſentence or not.

Thus, " Non-entry duties, run till the heir be returned, " and get precepts out of the Chancery, requiring the ſu- " perior to infeft him, becauſe a precept of *clare conſtat*, is " *voluntatis*, and what the ſuperior is not bound to grant; " and therefore he cannot be in *mora* for refuſing. Fountain- " hall 17th, Stair 18th July 1678. Fullerton againſt Den- " holm's." *Dictionary voce Non-entry*, vol. 2. p. 5.

And this principle hath been carried ſo very far by the Court, viz. That a ſuperior does not forfeit his right to the mails and duties, unleſs the vaſſal exerts himſelf to the utmoſt, to put him in *mora*, that the Court have refuſed to ſuſtain any thing leſs than an actual offer of a charter, with the compoſition due, to put the ſuperior in *mora*. Thus, " An adjudger having charged the ſuperior to infeft him, " and made offer of a charter with a year's rent, this was " found to put the ſuperior in *mora*, and to make him ly- " able for the full rents, he being in poſſeſſion by a declara-

" tor of non-entry, *Forbes*, 24 July 1713; The University " of Glasgow against Hamilton. But a simple charge is " not sufficient to put the superior in *mora*. *Stair*, 9 Febru- " ary 1669, Black against French. *Harcus*, (non-entry) " March 1684; Duke Hamilton against Ellies. *Harcus*, " (non-entry), July 1687; Laird Pourie against Smith." *Dictionary ibid.*

When such have been the decisions of the Court, and the principles established by them, so very forcible in behalf of the superior, the petitioner did apprehend, that after giving the citation in the declarator, he had thereby established a right in him, to the mails and duties from that period, which could not be defeated otherwise, than by his vassal offering him a charter to sign, and tendering the composition due to him on account of that charter. He therefore apprehended himself in *tuto*, to allow the action to sleep, especially as when he did so, he was engaged in the dispute with Messrs Copland and others, which was sufficient to take up all his time and attention, as a very large field was laid open in that cause, and a very extensive search made into records and old papers, and he now with all humility submits it to your Lordships, whether the allowing that action to fall asleep, ought to deminish his claim for the full mails and duties.

But even tho' your Lordships should be of opinion, that it ought to deminish that claim, still he apprehends, it ought to have no farther effect, than to strike off those mails and duties which had fallen due before the summons of wakening, for hereby from that time forwards, the petitioner was in the self same situation as he could have been, had he raised his action of declarator of that date, and he has lost no time since then, in pushing the cause forward to a decision, so that giving effect to the process falling asleep, as

as a legal defence against full mails and duties, still it can be carried no farther, than to the wakening of that same Process, from which period, the full mails and duties ought at all rates to be found due.

In the case of Burnet of Craigend, the House of Lords found the penal consequences of non-entry, to take place from the commencement of the action, altho' he had one of the strongest pleas of a *bona fides* that could be, for the Barons of Exchequer upon a full hearing of parties, had given him a charter from the Crown, and your Lordships by two consecutive interlocutors of the Innerhouse, had assoyllied him from the declarator. If therefore in any case, the general rule, that the mails and duties are due from citation were to have been altered, that case bade the fairest for an exception, as Burnet had a very plausible claim for being lyable in no conscequences of non-entry at all, till the judgement of the House of Lords, which was properly speaking, the foundation of the petitioner's decree. But without regard to the judgements that had been pronounced in his favour, that honourable House, found him liable to the penal consequence of non-entry, from the beginning of the process.

May it therefore please your Lordships, to alter your interlocutor so far, as to find that the petititioner is intitled to the full mails and duties of the lands mentioned in the summons, as belonging to John Fraser, from the date of the citation in this process.

According to justice, &c.

ANDREW CROSBIE.